in such normal redistricting efforts,[2] the impingement on various voters' First Amendment rights is justified in such circumstances because drawing new lines also serves important state interests.

But this is not the usual case. As noted above, redistricting in the modern era has been limited to those situations *where no valid map exists*. Indeed, "[s]ince 1910, when the House was fixed in size at 435, the norm has been that a census is followed by reapportionment across states to fit the population, and is followed in turn by redistricting within the states. After 1910, no state undertook a second redistricting within the 10-year period between censuses except when ordered by the courts." Norman Ornstein, *One Person, One Vote Is Vital – When It's Applied Within Reason*, Roll Call, Dec. 14, 2005, at 2, *available* at 2005 WLNR 20068295. In other words, redistricting has occurred when it needs to occur – usually when new census data render extant maps invalid under the one-person, one-vote principle.

Here, by contrast, redistricting was undertaken even though the existing Congressional map was valid and would have remained so until the next census. *See* Tex. Att'y Gen. Op. GA-0063 (Apr. 23, 2003) (concluding that State law did not require a new map and that 2001 map would remain valid until 2010 census). It was also undertaken without reference to any new population data – and without any effort to obtain or create such data – that could in theory justify a mid-decade redistricting. These differences are of pro-

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[2] See *Vieth*, 541 U.S. at 285 ("The Constitution clearly contemplates districting by political entities, see Article I, § 4, and unsurprisingly that turns out to be root-and-branch a matter of politics."); *Miller v. Johnson*, 515 U.S. 900, 914 (1995) ("[R]edistricting in most cases will implicate a political calculus in which various interests compete for recognition"); *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) ("Politics and political considerations are inseparable from districting and apportionment. . . . The reality is that districting inevitably has and is intended to have substantial political consequences.").

found consequence, because they squarely raise the question whether any cognizable state interest was served by the promulgation of a new map in 2003.

Indeed, the normal presumption that new maps are valid should not apply here without (at the very least) a careful examination of what interest the State has offered in place of the valid interests at stake when redistricting to replace an invalid map. The absence of those interests in the context of replacing a valid map means that there is necessarily a new balance of interests under this Court's "flexible standard" for measuring burdens on First Amendment rights under election regulations.

Without the usual presumptions in place, heightened scrutiny is triggered due to the burdens on expression inherent in redistricting and present to a self-evident degree here. Redistricting based on instincts of political self-preservation or partisan gain implicates "the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views." *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment) (citing *Elrod v. Burns*, 427 U.S. 347 (1976) (plurality opinion)). This is so because voters are entitled to vote their conscience and to align with political parties that share their views without the specter of viewpoint-based government action predicated on the exercise of that expression. In this instance, the Texas Legislature chose to redraw two-year-old district lines that had been drawn to reflect voting trends in the State and that had in the prior election produced results consistent with expectations solely and specifically to suppress further the representation of their political opposition.

It is neither surprising nor significant that this Court has not previously employed this flexible standard in a partisan gerrymandering case. This Court has often extended its First

Amendment jurisprudence in the past to account for new sets of circumstances. *See Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 740 (1996) ("The history of this Court's First Amendment jurisprudence, however, is one of continual development, as the Constitution's general command that 'Congress shall make no law . . . abridging the freedom of speech, or of the press,' has been applied to new circumstances requiring different adaptations of prior principles and precedents. The essence of that protection is that Congress may not regulate speech except in cases of extraordinary need and with the exercise of a degree of care that we have not elsewhere required."). Indeed, members of this Court have already recognized the relevance of the First Amendment in the partisan gerrymandering context. *See Vieth*, 541 U.S. at 314-15 (Kennedy, J., concurring in the judgment); *id.* at 324-25 (Stevens, J., dissenting).

For these reasons, the Texas Legislature's decision to draw patent viewpoint-based classifications during an unprecedented mid-decade redistricting in which no new population data was used requires the application of heightened judicial scrutiny.

II. THE TEXAS REDISTRICTING PLAN IS INVALID UNDER THIS COURT'S FLEXIBLE STANDARD FOR EVALUATING ELECTION REGULATIONS

Texas cannot identify a state interest that is sufficiently important to justify the First Amendment burdens imposed by the 2003 Plan. Between them, Texas and the court below identified two purported state interests. Although the State on remand principally asserted that its actions should be considered nonjusticiable, it also argued that it had a valid purpose in realigning the map to make "Texas's congressional delegation more like Texas's voting patterns." *See* State Defs' Opening Br. on Remand, *available* at 2003 WL 24051486. The three-judge panel below endorsed that principle and identified a second putative state interest: permit-

ting state *legislatures* to replace even valid court-drawn maps. *See Henderson v. Perry*, 399 F. Supp. 2d 756, 767-69 (E.D. Tex. 2005) (political purposes) (citing *Gaffney*, 412 U.S. at 754); *id.* at 775-76 & n.82 (replacing court-drawn maps) (collecting cases). Even if these ostensible interests provided "rational" bases for legislation – which the Center does not concede – they could not rise to the level of "important" state interests satisfying any form of heightened scrutiny.

1. The only interest actually advanced by the State of Texas below was that of securing a "congressional delegation more like Texas's voting patterns" at a time when a current and valid districting map was in effect. Put more directly, the State argues that it has an important state interest in securing further partisan advantage for one political party in the state's congressional delegation over others. Such a bare desire to advantage one political party and harm others based on their political views is not even considered a legitimate state interest, let alone an important one. A State has no legitimate interest in the success of any particular political party. *See Abate v. Mundt*, 403 U.S. 182, 187 (1971) (indicating that partisanship in favor of groups was not a legitimate state interest sufficient to justify population deviations among legislative districts); *Kirkpatrick v. Preisler*, 394 U.S. 526, 534 (1969) (same). If this were not so, then all sorts of discriminatory election laws might be permissible. *See Vieth*, 541 U.S. at 312 (Kennedy, J., concurring in the judgment) ("If a State passed an enactment that declared 'All future apportionment shall be drawn so as most to burden Party X's rights to fair and effective representation, though still in accord with one-person, one-vote principles,' we would surely conclude the Constitution had been violated.").

In addition, the fact that Texas frames its interest in electing more Republicans to Congress in terms of an interest in

better reflecting Texas voting patterns does not make the asserted interest any more capable of surviving heightened scrutiny. The notion that there is such a thing as a fairly "balanced" map that accurately reflects statewide voting patterns is illusory. A party's share of the vote varies from race to race and election cycle to election cycle, and which race or aggregation of races constitutes the appropriate proxy essentially is a matter of perspective. A state interest that is so elusive and ephemeral by nature cannot be an "important" state interest sufficient to justify burdening certain voters' First Amendment rights. To hold otherwise would be to invite States to draw new lines for every election cycle on the grounds that – based on whatever race a State wished to use at the moment – the new map better reflected statewide voting patterns. Permitting States to re-redistrict whenever they believed that the current map failed to sufficiently reflect statewide voting patterns would result in constant re-redistricting that would wreak the kind of "chaos" on the "democratic processes" that is antithetical to the very purpose of election regulations.[3] *Burdick*, 504 U.S. at 433 (quotation omitted).

2. The other interest offered by the court below fares no better. The panel explained that it is "within the prerogative

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[3] Of course, a State may attempt to achieve what it believes to be a politically balanced map in the course of normal redistricting. *See Gaffney*, 412 U.S. at 754. But merely because it is permissible for a State to pursue such an end does not mean that political balance is an important state interest. Indeed, unlike the predicates for a traditional redistricting, political balance is neither a constitutional nor a legal requirement. *See Davis*, 478 U.S. at 130 ("Our cases, however, clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be."); *id.* at 131 ("*Gaffney* in no way suggested that the Constitution requires the approach that Connecticut had adopted in that case.").

of the state legislatures" "to draw their own map to replace one imposed by a court." *Henderson*, 399 F. Supp. 2d at 775. But the court strained to find any precedent to support such a broadly framed proposition, settling instead for two cases that involved court-made maps that – unlike the 2001 map – contained built-in expiration dates and another case arising under circumstances entirely unlike those in this case. *See id.* at 775 n.82 (collecting cases). It failed to identify any precedent that demonstrates that a State's purported interest in permitting a legislature to replace a valid court-imposed map is sufficiently important to justify the infringement of certain voters' core expressive rights.

To be sure, this Court has recognized that, in the absence of an extant valid map, a new map drawn by a state legislature is preferable to one drawn by a federal court. *E.g.*, *Gaffney*, 412 U.S. at 749 ("Nor is the goal of fair and effective representation furthered by making the standards of reapportionment so difficult to satisfy that the reapportionment task is recurringly removed from legislative hands and performed by federal courts which themselves must make the political decisions necessary to formulate a plan . . . . From the very outset, we recognized that the apportionment task, dealing as it must with fundamental 'choices about the nature of representation,' . . . is primarily a political and legislative process.") (quoting *Burns v. Richardson*, 384 U.S. 73, 92 (1966), and citing *Reynolds v. Sims*, 377 U.S. 533, 586 (1964)); *see also Branch v. Smith*, 538 U.S. 254, 262 (2003); *Connor v. Finch*, 431 U.S. 407, 414-15 (1977). But that principle was not abrogated here. The intervention of a federal court in this case was made necessary only by the Texas Legislature's inability to perform its duty following the 2000 census. When the legislature is unable to complete its task in a timely fashion, a court may step in and promulgate a new set of lines. *Connor*, 431 U.S. at 415. The fact that there is a *preference* for having legislatures rather than courts draw district lines when new maps need to be drawn does not

mean the State has any interest, much less an "important" one, in replacing a court-drawn map with one drawn by the legislature.

Moreover, the insufficiency of this purported state interest is further made apparent by the fact that the 2003 Plan governed *Congressional* elections, matters which are not within a State's unfettered discretion to regulate. The Texas Legislature's authority to draw the boundaries of Congressional districts does not inhere in its sovereign power as a State. Rather, this authority derives from the Elections Clause of the United States Constitution, which permits States to regulate only the "Times, Places, and Manner" of elections for the U.S. House of Representatives. U.S. Const. art. I, § 4. Importantly, this Court has made clear that a state legislature's power to regulate federal elections – including its redistricting power – was not one of the powers "reserved by" the States under the Tenth Amendment. *Cook v. Gralike*, 531 U.S. 510, 522 (2001) ("Because any state authority to regulate election to those offices could not precede their very creation by the Constitution, such power 'had to be delegated to, rather than reserved by, the States.'") (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804-05 (1995)). Just as important, "the Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and *not as a source of power to dictate electoral outcomes*, to favor or disfavor a class of candidates, or to evade important constitutional restraints." *Thornton*, 514 U.S. at 833-34 (emphasis added). By definition, a State cannot have an important interest in permitting the legislature to craft a map that "dictate[s] electoral outcomes" when a valid court-crafted map already secures the State's other legitimate interests.[4]

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[4] This is not to say that a State can never have an interest in permitting a legislature to replace a court-drawn map. The Center does not dispute that a legislative map that replaced a court-imposed one could be

3. Finally, even assuming that one of these asserted state interests was sufficiently important to justify replacing the valid 2001 Plan with a new Congressional map, the 2003 Plan is not narrowly tailored to that purpose. As noted above, election regulations that burden voters' First and Fourteenth Amendment rights are evaluated under a flexible standard and the constitutional harm inflicted should not significantly exceed the important state interest being served. *Burdick*, 504 U.S. at 434. In drafting the 2003 Plan, however, the Texas Legislature utilized 2000 census data – data which was by then three years out of date. In so doing, the Legislature not only burdened certain voters' fundamental rights, but it also drew districts in a manner wholly indifferent to the one-person, one-vote constitutional requirement. Even if "partisan balancing" or legislative prerogative is a sufficiently important ground for redrawing a valid Congressional map, neither supposed interest can justify drawing a new map that makes no effort to ensure actual population equality exists between Congressional districts.[5]

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valid, even if done mid-decade, if it advanced an important state interest, such as updating population data, without unnecessarily classifying voters on the basis of their expressive rights.

[5] The Center does not suggest that the 2001 Plan's districts presently contain equal populations or that they contained equal populations at the time the 2003 Plan was enacted. Rather, it merely points out that, at the time the 2001 Plan was put in place, that Plan created districts with equal populations based on population data that was valid for that redistricting. In contrast, the 2003 Plan used population data which, for the reasons set forth by the *Travis County* appellants, was not valid for that redistricting. Thus, regardless of the extent to which the districts under the 2003 Plan actually deviate from population equality, the fact remains that the 2003 Plan was enacted without any regard for the one-person, one-vote constitutional requirement and without any effort to minimize actual population deviations. The Center merely posits that a mid-decade redistricting that involves the redrawing of valid district lines should not be deemed to be sufficiently tailored to an important state interest absent an effort to create actual population equality.

III. THE FLEXIBLE STANDARD IS NEITHER UNLIMITED NOR UNMANAGEABLE AS APPLIED TO THE REDISTRICTING PLAN IN THIS CASE

The foregoing framework for analyzing mid-decade partisan gerrymandering claims is both limited in application and sufficiently manageable. For the reasons stated above, this Court's flexible standard, which it has already applied in the context of other election regulations, has limited applicability to a map promulgated to satisfy a State's obligation to comply with one-person, one-vote requirements. That interest is concededly a compelling one, and in such cases the federal courts cannot "tie the hands of States," even though the new maps "will invariably impose some burden upon individual voters." *Burdick*, 504 U.S. at 433. Indeed, it is uncertain whether this framework would even result in the invalidation of all mid-decade redistricting plans.

In addition, the standard is also a manageable one. This Court already has a wealth of experience in applying the flexible standard to other election regulations that burden voters' First Amendment rights. That precedent provides guideposts for applying the test in a consistent and predictable way. Furthermore, in contrast to the standard partisan gerrymandering case, this standard does not require this Court to judge how much partisanship is too much. Instead, this Court merely needs to examine whether a State can provide an important state interest that would justify redistricting when a valid map was already in place.

CONCLUSION

For the foregoing reasons, and for the reasons stated by appellants, this Court should reverse the ruling of the District Court and remand the case with instructions to reinstate the valid map promulgated by the Eastern District of Texas.

Respectfully submitted,

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IN THE

Supreme Court of the United States

EDDIE JACKSON; LEAGUE OF UNITED LATIN AMERICAN CITIZENS; TRAVIS COUNTY; GI FORUM OF TEXAS,

Appellants,

v.

RICK PERRY, *et al.*,

Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

BRIEF OF *AMICI CURIAE* ALAN HESLOP, PHD.; ROD ADAIR; GARY BERNER; JOHN A. MORGAN; JOHN B. MORGAN; AND ROBERT WARD IN SUPPORT OF APPELLEES

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INTEREST OF *AMICI CURIAE*

Amici Curiae are academics and/or practitioners with practical experience in the districting phase of the apportionment process. They are all either responsible for, or work with those responsible for, the drafting of district-based representational plans around the nation. Their combined experience covers just about all of the steps of the complex process whereby political power in America is distributed amongst the people. All have been involved, at some level, with districting for both congressional delegations and state legislatures. *Amici* share a concern for fair redistricting and an enlightened role for the courts in this inherently political process.[1]

Amicus **Alan Heslop, PhD.,** is Director Emeritus and Founder of the Rose Institute at Claremont McKenna College, Claremont, California. He was the Rose Professor of State and Local Government at Claremont McKenna from 1967 until 2004 and is now Senior Research Fellow in the School of Politics and Economics at Claremont Graduate University. He has also taught political science at the University of Texas and Texas A&M. One of his major areas of interest at the Rose Institute has been all phases of preparation for, and review of, representational plans. He has been involved with the districting aspects of apportionment for numerous clients over the past four decades in many states from start to finish. He has been an expert witness on redistricting and electoral matters and has served on federal and state commissions.

Amicus **Rod Adair** is President of New Mexico Demographic Research, Roswell, New Mexico and a State Senator. He drafted and reviewed plans for the 2001 legislative and congressional redistricting in New Mexico. He also redistricted county commission and school board districts throughout the state. In 2001 and 2002 he served as an expert witness in New Mexico court cases involving both the congressional and state House of Representatives redistricting.

1. No counsel for a party authored this brief in whole or in part. No monetary contribution toward the preparation or submission of this brief has been made by any person other than *Amici Curiae* and their counsel. By letters filed with the Clerk, counsels for all parties have consented to the filing of this brief.

Amicus **Gary Berner** is Senior Staff member of the House Republican Caucus of the Connecticut General Assembly, Hartford, Connecticut. In addition to his current role as Sr. Policy Advisor to the Minority Leader, he has served as the Caucus's Chief of Staff (1994-2000) and as the Caucus's Redistricting Director (2000-2002). As Redistricting Director, Mr. Berner had responsibility for the preparation, monitoring and oversight of, the districting plans that are considered by the state legislature. This includes plans for both congress and both houses of the General Assembly. Prior to his staff assignments Mr. Berner was twice elected to the Connecticut House of Representatives (1987-1991), and was selected as an Asst. Minority Leader in his second term.

Amici **John A. Morgan** is President, and **John B. Morgan** is Vice-President of Applied Research Coordinates, Ltd., Reston, Virginia. Together they have over forty years of experience with the drafting and review of districting plans for representational entities in over a dozen states. As redistricting practitioners they have worked on and reviewed hundreds of maps and districting plans across the county. This includes plans for congress and state legislatures. They advise legislative caucuses both as to the preparation for districting as well as the post-districting application of campaigns and election support.

Amicus **Bob Ward** is the Minority Leader of the Connecticut House, Hartford, Connecticut. Representative Ward is currently serving in his eleventh elected term and his sixth term as Minority Leader, making him the longest serving legislative leader in modern Connecticut history. He spearheaded the operation of the House Republicans' effort to prepare for, draft, and review the districting plans for congress and the legislature that were considered by the General Assembly following the 2000 census. He served on the Reapportionment Committee, and then was appointed by the Governor to the Reapportionment Commission which adopted the congressional plan.

SUMMARY OF ARGUMENT

The 2004 Texas congressional redistricting plan is not an excessive or egregious partisan gerrymander. As is clear from this Court's partisan gerrymandering jurisprudence, and the briefs of the parties in this appeal, there are many proposed methods for attempting to measure the "partisan fairness" of a districting plan. The undersigned *Amici* seek to assist the Court in its analysis of the 2004 Texas plan by providing the Court with analyses – based upon election results and simple mathematical measures – of Texas congressional plans used in the 2000, 2002 and 2004 elections. These analyses are based upon comparisons of these plans with generally accepted relationships between votes received and seats won. *Amici* explain this seats-votes ratio, which is often depicted in a graph known as the "seats-votes curve," and illustrate how a party winning more than a majority of the votes usually wins a supermajority of the seats due to a "seat bonus." In support of their analyses, *Amici* provide the Court with data from a variety of different elections so that there can be no issue as to whether *Amici* have "cherry picked" election results in order to reach a desired conclusion. Regardless of the analytical method employed, the various election results analyses presented by *Amici* compel a single conclusion: the 2004 Texas congressional plan is more "partisanly fair" than the 2002 plan. As the analysis in the brief shows and the District Court concluded below, the 2004 plan more accurately represents the partisan balance of the state of Texas. The generally accepted seats-votes curve analysis shows that election results under the 2004 plan are closer than those under the 2002 plan to what is expected in a majoritarian congressional districts election system such as ours.

This Court cannot determine that the Texas legislature acted in an invidious manner or in a way unrelated to any legitimate legislative objective unless it is willing to overrule a line of precedents begun with *Gaffney v. Cummings*, 412 U.S. 735 (1973). The state of Texas 2004 congressional districting plan more accurately provides for a distribution of congressional seats based upon relative partisan strength – election results – than the 2002 plan. This Court recognized